



FREDERICK COUNTY PLANNING COMMISSION

June 14, 2017

TITLE: Ballenger Run PUD

FILE NUMBER: S-1143 APFO #13263

REQUEST: Amended Letter of Understanding (LOU)

The Applicant is requesting an amendment to the Roads portion of the LOU, for the purpose of amending the guarantee requirements and APFO required scope of improvements for Phase III of the improvements to Ballenger Creek Pike, from Hanover Drive to Crestwood Blvd.

PROJECT INFORMATION:

ADDRESS/LOCATION: East side of Ballenger Creek Pike, north of Ballenger Creek
TAX MAP/PARCEL: Tax Map 86 Parcels 53, 54 & 243
COMP. PLAN: Medium Density Residential & Natural Resource
ZONING: Planned Unit Development (PUD) & Agricultural (A)
PLANNING REGION: Frederick
WATER/SEWER: W3/S3

APPLICANT/REPRESENTATIVES:

APPLICANT: SeD Maryland Development, LLC
ATTORNEY: Linowes & Blocher, LLP

STAFF: Ron Burns, P.E., Transportation Engineer

ATTACHMENTS:

EXHIBIT 1 – Executed LOU
EXHIBIT 2 – Proposed Amended LOU

STAFF REPORT

ISSUE

The Applicant is requesting an amendment to the roads requirements in the Ballenger Run PUD Letter of Understanding (LOU) (see Exhibit 1), for the purpose of amending the guarantee requirements and APFO required scope of improvements for Phase III of the Ballenger Creek Pike (BCP) road improvements, from Hanover Dr. to Crestwood Blvd. This amendment (see Exhibit 2) will ease the required surety timeframe to permit a short term approval of the final plat for the 210 Ballenger Run Apartments while keeping in place the timeframe that the road improvements must be open to traffic by issuance of the 400th building permit. In addition, the breakpoint between Phase III and Phase IV improvements is being slightly shifted from Hanover Drive to the adjacent bridge over Pike Branch, and the intersection geometry at BCP and Crestwood Blvd. is being modified. This will result in more logical termini for the phases of construction and a less costly but improved level of service at the Crestwood Blvd. intersection.

BACKGROUND

This Project (visual on the next page) achieved its APFO approvals as part of a DRRA process administered and approved by the previous Board of County Commissioners. The LOU was executed on October 17, 2013 and has a validity period of 10 years, until October 17, 2023. The LOU calls for the contribution of \$487,052 toward area road escrow accounts and a multi-million dollar, four phase upgrade to Ballenger Creek Pike, from two to four lanes, from the south end of the site to Crestwood Blvd. The escrow payment has been paid to the County and the first two phases of the BCP project are now under construction, including a much requested new signal at Corporate Drive.

Once completed, and in combination with the State Highway Administration (SHA) widening to Ballenger Creek Pike north of Crestwood Blvd (the southern section now open to traffic and the extension to Swallowtail Drive in final design and funded for construction), a four lane, largely divided urban boulevard will exist from Ballenger Creek to just west of Swallowtail Drive. This includes a sidewalk and narrow shoulders for on-road bike riders.

The improvement plans are now being developed for Phase III of the BCP improvements. As part of detailed engineering it was discovered that the construction of a northbound right turn lane is difficult to provide because of utility, lane transition requirements and right-of-way constraints. It was also determined that the logical break point between Phases III and IV needs to shift from the Hanover Drive intersection to the adjacent bridge because of the complications associated with the intersection improvements and maintenance of traffic.

Finally, the County was about to embark on an improvement at the Crestwood Blvd. intersection that would provide a free flow right turn lane from westbound Crestwood Blvd. to northbound BCP. In order to avoid three different construction zone set ups in three years (SHA, then County, then developer), the County improvements would be added to the developer's improvements.

ANALYSIS

This will address the amendments to the LOU:

1. *The Explanatory Note set forth above is incorporated into the LOU as if fully restated herein.*
2. *Section 2.A.1.c and d on page 4 of the LOU are hereby deleted and replaced with the following:*

“c. Phase III: widen Ballenger Creek Pike from the bridge north of Hannover Drive to the northern leg of the intersection of Crestwood Boulevard and Ballenger Creek Pike.

d. Phase IV: widen Ballenger Creek Pike from Corporate Drive to the bridge north of Hannover Drive.”

These amendments modify the logical break point as described previously and increases the northern limits of the project at Crestwood Blvd. from the south leg of BCP to the north leg.

The northbound right turn lane is excluded because of difficult constructability and the scope for the improvement plans (IP's) now includes a southbound double left to go east on Crestwood Blvd., which more than mitigates the loss of the northbound right turn lane and improves the level of service at this intersection, which would be LOS = A upon completion of the improvements.

In addition, the scope of improvements will include the creation of a westbound to northbound free right turn in front of the Wawa, which will eliminate the long weekday pm peak period queue. This improvement was to have been built by the County but will now be included in the developer's IP's.

3. *Following Section 2.A.1.d., the paragraph that begins at the bottom of page 4 of the LOU and concludes at the top of page 5 of the LOU is hereby deleted and replaced with the following:*

“Phase I improvements shall be guaranteed prior to recordation of the first subdivision plat in Ballenger Run PUD – All Age, with completion prior to issuance of the 100th building permit in Ballenger Run PUD – All Age; Phase II improvements shall be guaranteed prior to recordation of the subdivision plat that includes the 100th lot in Ballenger Run PUD – All Age, with completion prior to issuance of the 200th building permit in Ballenger Run PUD – All Age; Phase III improvements shall be guaranteed on or before February 1, 2018, with completion prior to issuance of the 400th building permit in Ballenger Run PUD – All Age; and Phase IV improvements shall be guaranteed prior to recordation of the subdivision plat that includes the 400th lot in Ballenger Run PUD – All Age, with completion prior to issuance of the 600th building permit in Ballenger Run PUD – All Age.

This is a partnering concession to the developer who was not diligent in starting the IP's for Phase III in time to meet the market demands to record a plat for the 210 multifamily units, which under current count would add up to about 320 units (110 current plats recorded plus the 210), 300 units being the cap. Changing the surety requirement to a date certain (February 1, 2018) allows the apartment project to advance but still maintains the current requirement that the Phase III improvements be open to traffic prior to the issuance of the 400th building permit.

4. *Add a paragraph under Section 2.C on page 7 of the LOU – new third paragraph:*

SeD shall be entitled to reimbursement of the entire current escrow account balance, once a guarantee has been established for Phase III improvements, and future balances may be

requested on an annual basis (up to the fair share amount as described in the next paragraph), from the following Road Escrow Accounts:

- a. #3312: BCP/Crestwood – Westbound Free Right Movement*
- b. #3344: BCP/Crestwood – Second Southbound Receiving Lane*
- c. #3347: BCP/Crestwood – Northbound Acceleration Lane*
- d. #3762: BCP/Corporate - Signal*
- e. #3763: BCP/Crestwood – Second Southbound Left Turn Lane*
- f. #4412: BCP from Ballenger Creek to Crestwood – Four Lane Widening*

Because the developer is constructing an improvement on behalf of the County, the free right turn in front of Wawa, this gives certainty of reimbursement, which they would be entitled without explicitly stating anyway. The current escrow account balance for this improvement (#3312 and #3347) is \$92,500.

5. *Add a new subsection 4 after 2.D.3 on page 8 of the LOU:*

4. Notwithstanding the above procedures, in the case of the property acquisition from the property in the northeast quadrant of the intersection of BCP and Crestwood Blvd., the County shall be responsible for acquiring the land necessary, in that quadrant, to implement improvements north of Crestwood Blvd.

The “above procedures” deals with the process for all off-site APFO improvements required to be built. This new language specifies that the county is responsible for acquisition of any land from Wawa necessary to accommodate the County improvement.

6. *Except as herein modified, the remainder of the LOU shall remain unchanged and in full force and effect.*

In conclusion, staff finds that the changes proposed in the amended LOU not only assures adequate public facilities for roads, concurrent with the trips being generated by same, but also improves the level of service at the BCP/Crestwood Blvd. intersection over what was already approved in the original LOU. In addition, the developer has assumed the construction responsibility and associated risks in building a County planned improvement.

RECOMMENDATION

Staff recommends approval of the consent agenda for execution of an amendment to the LOU for the Ballenger Run development.



Frederick County Board of County Commissioners

Winchester Hall, 12 East Church Street, Frederick, MD 21701

ADEQUATE PUBLIC FACILITIES LETTER OF UNDERSTANDING

Ballenger Run PUD – All Age

The following Letter of Understanding (“LOU”) between the Frederick County Board of County Commissioners (“BOCC”), its successors or assigns, and RBG Family LLC (“Owner”), its successors or assigns, sets forth the conditions and terms which the BOCC deems the minimum necessary improvements dealing with roads, schools, water and sewer service that must be in place for the property described below (the “Property”) to be developed in compliance with the Adequate Public Facilities Ordinance (“APFO”), which is codified as Chapter 1-20 of the County Code. The proposed planned unit development (hereinafter “Ballenger Run PUD – All Age”) is an all-age residential planned unit development. Ballenger Run PUD – All Age was formerly approved as an age-restricted (55 and older) residential development, consisting of 970 single family (attached and detached) and multifamily dwelling units. Concurrent with the processing of this LOU, Owner is seeking approval by the BOCC of an Amended Phase I PUD to permit the development of Ballenger Run PUD – All Age, as well as the concurrent approval by the BOCC of a Development Rights and Responsibilities Agreement (“DRRA”) under Section 1-25 of the County Code.

Owner hereby agrees and understands that compliance with the terms and conditions of this LOU is required for the development of Ballenger Run PUD – All Age to proceed. While this LOU is subject to approval by the BOCC through the process of, and concurrent with, the DRRA, it is expressly agreed that the LOU is a document which is separate and apart from the DRRA and that the LOU may be amended by the parties, by written amendment to be approved by the Frederick County Planning Commission, with no requirement to amend the DRRA.

The Property is comprised of 197.24 ± acres of land located on the east side of Ballenger Creek Pike, 550 feet south of Corporate Drive, west of Kingsbrook PUD, and north of Ballenger Creek. 130.8 ± acres of the Property is zoned Planned Unit Development (“PUD”) and the remaining 66.4 ± acres of the Property is zoned Agricultural (“Ag”). Ballenger Run PUD – All Age will be developed with a maximum of 855 residential units, including approximately 180 all-age single-family detached dwelling units, 265 all-age single-family attached dwelling units, 210 all-age multifamily dwelling units and a 200-unit Continuing Care Retirement Community (“CCRC”)¹ or any variation of dwelling unit mix, provided that: (a) there is not an increase in site trips or a significant redistribution of site traffic because of a change in land use or increase in site density, as defined in the TIA Guidelines (as defined below in Section C); (b) there is no

¹ The conditions of the Phase I approval for Ballenger Run – All Age permit the Owner to convert the 200-unit CCRC into 200 age-restricted multi-family dwelling units with Planning Commission approval.

increase in the total peak hour vehicle trips above those identified in Section 2 of this LOU and analyzed with the Traffic Impact Analysis prepared on behalf of Owner (as amended) for Ballenger Run PUD – All Age, by The Traffic Group, Inc., dated January 9, 2013 (the “TIA”); and (c) further provided that there is no increase in student generation as noted in the school APFO analysis contained in Section 3 of this LOU. This LOU may be amended should any vehicle or student generation increase based on changes to the housing and use types described above.

1. PUBLIC WATER AND SEWER

The Property has a water and sewer classification of W-3 Dev./S-3 Dev., indicating that public water and sewer service is planned within 1-3 years. The Division of Utilities and Solid Waste Management (DUSWM) has conditionally approved the adequacy of the public sewer and water facilities to serve Ballenger Run PUD – All Age. Ballenger Run PUD – All Age will be served by a network of existing public water and sewer mains and service connections. Programmed improvements to the County’s water and sewer systems serving this region will be provided to Ballenger Run PUD – All Age through the following developer-funded and County CIP improvements:

A. Water:

Two water projects, which have recently been constructed as County CIP projects, will provide adequate service for the build-out of Ballenger Run PUD – All Age:

1. The completion of the Potomac River Water Transmission Main; and
2. The expansion of the New Design Water Treatment Plant.

Owner, unless otherwise noted below, shall be responsible for the following improvements: in conjunction with the overall site development efforts, Owner will construct two 8-inch water line connections (or larger if determined necessary by the Division of Utilities and Solid Waste Management (“DUSWM”) to the existing 16” water main located along Ballenger Creek Pike to the property line of Ballenger Run PUD – All Age. In addition, Owner will provide an 8-inch connection to the existing 8-inch water line located in the northeast portion of the Property (W&S contract #163B-SW) in Ballenger Crossing PUD. All Owner-constructed connections will be adequate to accommodate Frederick County’s required operating pressure and minimum residual pressure criteria for Ballenger Run PUD – All Age, at the worst case conditions (peak day plus fire flow).

Availability of record plats shall be in accordance with the County’s current policy for Interpretation of §1-16-106 of the Frederick County Code, attached hereto as Attachment “2”.

B. Sewer:

Sewer service is proposed to be provided by way of connections to two existing interceptor sewer lines that follow the alignment of Ballenger Creek – a 30” interceptor sewer that follows the alignment of Ballenger Creek west to the confluence with Pike Branch, and a 24” interceptor sewer that has been extended west along Ballenger Creek to Ballenger Creek Pike. Sewer service necessary to serve the full build-out of Ballenger Run PUD – All Age will be dependent upon available treatment capacity at the Ballenger-McKinney Wastewater Treatment Plant (Phase I), which is already fully funded in the County's CIP for design, and is scheduled for construction completion (publicly funded) in 2014. Sanitary sewer lines to serve Ballenger Run PUD – All Age will be appropriately sized per DUSWM requirements and connected at appropriate connection points, as will be further identified and engineered as Ballenger Run PUD – All Age progresses through the development approval process.

Availability of record plats shall be in accordance with the County's current policy for Interpretation of §1-16-106 of the Frederick County Code, attached hereto as Attachment “2”.

Other:

APFO approval for water and sewer does not guarantee that plats will be recorded or building permits issued. Plat recordation and building permit issuance is subject to compliance with the Annotated Code of Maryland, Environment Article Section 9-512 *et seq.* and all applicable County policies and regulations.

2. ROAD IMPROVEMENTS

The TIA was prepared to address APFO requirements stemming from the additional vehicle trips associated with Ballenger Run PUD – All Age (additional trips generated by the conversion from age-restricted to all-age dwelling units), and to propose mitigation and/or the funding of mitigation and a phasing schedule for required roadway facilities. The TIA has determined that Ballenger Run PUD – All Age will generate 210 additional weekday a.m. peak hour trips and 259 additional weekday p.m. peak hour trips at full build out.² Additional road improvements designed to enhance the safety and circulation of the road network serving the Ballenger Run PUD – All Age and the surrounding neighborhood have been identified and are set forth below.

² As noted above, the PUD Amendment granted the Owner the option (conditioned upon Planning Commission approval) to develop 6.0 acres of the Property either as a 200-unit CCRC or as 200 age-restricted multifamily dwelling units. This LOU evidences approval for both uses of the Property, noting that the traffic projections set forth in the TIA reflect the future use of this portion of the Property as 200-unit CCRC.

The roadway impacts for each development phase of Ballenger Run PUD – All Age will be mitigated through either construction, full fee in lieu of funding, and/or a pro-rata contribution to existing County-held escrow accounts (where applicable) in accordance with Frederick County standards. Owner agrees to construct or contribute to the following improvements, pursuant to the phasing schedule identified in the TIA, in order to mitigate the effects upon the transportation network serving Ballenger Run PUD – All Age:

A. APFO Road Improvements, Full Fee-in-Lieu Funding, and/or Escrow Payments:

In satisfaction of APFO requirements to fully mitigate site-generated trips (and in addition to the escrow contributions set forth in (B) below) Owner shall construct or cause to be constructed the following road improvements during the three (3) phases of development of Ballenger Run PUD – All Age:

1. Widen Ballenger Creek Pike from its existing section to a four-lane divided highway of varying width (4' to 20') median, or undivided where deemed reasonable by the County due to cost or adverse right-of-way constraints, from north of the Ballenger Creek bridge at the southern part of the Property northward to the southern leg of the intersection of Crestwood Boulevard and Ballenger Creek Pike, with left turn lanes as needed, generally no added acceleration or deceleration lanes, and to include an appropriate traffic control device (roundabout or traffic signal) at Corporate Drive. The appropriate traffic control device and final sectional roadway design shall be determined at the design phase. These improvements shall be constructed or funded by Owner in three phases as follows:

a. Phase I: construct an appropriate traffic control device (roundabout or traffic signal to be determined by the County) at Corporate Drive;

b. Phase II: widen Ballenger Creek Pike from the bridge at the southern end of the Property frontage to Corporate Drive;

c. Phase III: widen Ballenger Creek Pike from Hannover Drive to the southern leg of the intersection of Crestwood Boulevard and Ballenger Creek Pike, and construct an additional northbound right turn lane at the intersection of Ballenger Creek Pike and Crestwood Boulevard; and,

d. Phase IV: widen Ballenger Creek Pike from Corporate Drive to Hannover Drive.

Phase I improvements shall be guaranteed prior to recordation of the first subdivision plat in Ballenger Run PUD – All Age, with completion prior to issuance of a building permit for the 100th equivalent dwelling unit in Ballenger Run PUD – All Age; Phase II improvements shall be guaranteed prior to recordation of the subdivision plat that includes the 100th equivalent dwelling

unit in Ballenger Run PUD – All Age, with completion prior to issuance of a building permit for the 200th equivalent dwelling unit in Ballenger Run PUD – All Age; Phase III improvements shall be guaranteed prior to recordation of the subdivision plat that includes the 300th equivalent dwelling unit in Ballenger Run PUD – All Age, with completion prior to issuance of a building permit for the 400th equivalent dwelling unit in Ballenger Run PUD – All Age; and Phase IV improvements shall be guaranteed prior to recordation of the subdivision plat that includes the 400th equivalent dwelling unit in Ballenger Run PUD – All Age, with completion prior to issuance of a building permit for the 500th equivalent dwelling unit in Ballenger Run PUD – All Age.³

The improvements listed above in 1(a) through 1(d) will be guaranteed by Owner for completion; however, Owner reserves the right to enter into a public-private partnership and/or to enter into an agreement with the owner(s) of other property, the development of which may require the same or similar roadway improvements, in order to jointly accomplish these improvements, so long as such agreement results in the required improvements being fully funded for completion, and the parties hereby agree that such agreements may be reflected in a separate or supplemental agreement without the need to revise this LOU.

2. Owner shall provide full fee-in-lieu funding for the construction of a third southbound thru lane, as an auxiliary lane on MD 180, from south of the US 340/15 overpass to just north of the I-70 bridge piers. As determined by DPDR-Traffic Engineering Staff, the full fee in lieu for this road improvement is \$97,900, which shall be provided prior to the recordation of the first subdivision plat in Ballenger Run PUD – All Age.

3. Construct improvements to Ballenger Creek Pike, south of Ballenger Center Drive to north of Solarex Court, in accordance with the design specifications for SHA Project No. FR1245187.

Owner will guarantee this improvement for completion prior to the recordation of the first subdivision plat in Ballenger Run PUD – All Age, and the improvement shall be open to traffic prior to the issuance of the first Building permit (except model homes) in Ballenger Run PUD – All Age (except model homes); however, the parties hereby agree that if this improvement is fully funded for construction by others, specifically including the full-funding of this improvement by the State Highway Administration, and provided that the terms of such funding will result in the improvement being guaranteed for construction prior to the date upon which Owner wishes to record the first subdivision plat in Ballenger Run PUD – All Age and will be under construction prior to the issuance of the first building permit (except model homes), then

³ For the purposes of this section and determining phasing of improvements only, four (4) CCRC units/beds shall be deemed to equal one (1) equivalent dwelling unit; i.e., a building permit for a 200-unit CCRC building shall equal 50 equivalent dwelling units. All other dwelling types other than CCRC units shall equal one unit per each equivalent dwelling unit.

in that event Owner's sole requirement in connection with this improvement shall be to contribute its pro rata share into the existing escrow accounts, which are set forth in Section B(1)(b) below.

B. Escrow Accounts:

In full satisfaction of APFO requirements to contribute to all area escrow accounts (per Section 1-20-12(H)), prior to the recordation of the first record lot for Ballenger Run PUD – All Age, Owner shall pay into County-held escrow accounts the following pro rata contributions:

1. Existing County-held Escrow Accounts:

a) Ballenger Creek Pike/Crestwood Boulevard: the Owner shall contribute the appropriate pro-rata shares to existing escrow accounts for improvement of this intersection by others. As determined by DPDR-Traffic Engineering Staff, the Owner's pro-rata contributions to this road improvement are:

1. Escrow Account No.3312: \$1,823
2. Escrow Account No.3344: \$9,831
3. Escrow Account No.3347: \$9,179
4. Escrow Account No.3935: \$11,860

b) Ballenger Creek Pike, south of Ballenger Center to north of Solarex Court: the Owner shall contribute the appropriate pro-rata shares to existing escrow accounts for improvement of this roadway by others. As determined by DPDR-Traffic Engineering Staff, the Owner's pro-rata contributions to this road improvement are:

1. Escrow Account No. 3313: \$2,146
2. Escrow Account No. 3301: \$18,844
3. Escrow Account No. 3303: \$9,375
4. Escrow Account No. 3304: \$ 9,408

c) Ballenger Creek Pike Mainline Between Ballenger Center Drive and Solarex Court: the Owner shall contribute the appropriate pro-rata share to Existing Escrow Account No. 3300 for improvement of this roadway by others. As determined by DPDR-Traffic Engineering Staff, the Owner's pro-rata contribution to this road improvement is \$356,231.

d) Per the APFO LOU dated October 10, 2007 for the Ballenger Run Active Adult Community, upon which the TIA was based, the Owner shall also contribute the previously agreed upon pro-rata shares to the following escrow accounts:

1. Escrow Account No. 3935: \$9,355

2. Escrow Account No. 3344: \$9,560
3. Escrow Account No. 3345: \$3,475
4. Escrow Account No. 3347: \$7,240
5. Escrow Account No. 3312: \$1,440
6. Escrow Account No. 3307: \$5,770
7. Escrow Account No. 3247: \$7,785
8. Escrow Account No. 3302: \$6,880
9. Escrow Account No. 3313: \$630
10. Escrow Account No. 3303: \$3,000
11. Escrow Account No. 3304: \$3,220

2. Total of All Escrow Contributions: The total amount of all Escrow Account Contributions as of the date hereof is \$487,052. Should this payment not be made within one year of the execution of this LOU, the County reserves the right to adjust this amount, based on an engineering cost index. As outlined in Section C below, additional escrow payments may be required, when deemed necessary by the County, if road improvements required in Section A are built in part or whole by others with the understanding that current fair share contributions have been determined to be: \$175,389 for the Ballenger Creek Pike/Corporate Drive Roundabout and \$9,537 for the northbound right turn lane on Ballenger Creek Pike at Crestwood Blvd.

C. SURPLUS CAPACITY REIMBURSEMENT IMPROVEMENTS

Owner has agreed to construct certain infrastructure improvements to serve Ballenger Run – All Age which could result in the creation of excess capacity in such improvements that could be used to benefit other development projects. The parties agree that the following road improvements have been determined to be “Surplus Capacity Reimbursement Improvements” (“SCR Improvements”) as that term is defined in Chapter 12 of the Guidelines for Preparation of Traffic Impact Analyses for Development Applications, adopted September 6, 2011, by the BOCC by Resolution No. 11-24 (“TIA Guidelines”):

1. Road improvements set forth in LOU Section 2.A.1, above
2. Road improvements set forth in LOU Section 2.A.2, above

All contributions made by other developers to for improvements to Ballenger Creek Pike, as well as any other future escrow accounts along Ballenger Creek Pike whose identified improvements would no longer be needed with the construction of the SCR Improvements, shall be paid by the County to Owner for the construction of the SCR Improvements above).

In the event that other approved development projects add “trips” to any off-site road improvements listed above and thus are required to pay their pro rata share of the construction cost of said roads into escrow, Owner shall be entitled to reimbursement of the cost of the SRC Improvements, up to but not beyond its own identified fair share (either through reimbursement

of actual construction costs incurred by Owner if the Owner constructs said roads or through the reimbursement of the full fee-in-lieu escrow funds paid by the Owner as provided above), subject to compliance with and in accordance with the requirements of Chapter 12 of the TIA Guidelines, from non-exempt developers of projects identified by the County Traffic Engineer, whether or not the SCR Improvements are located inside or outside of the contributing project's study area. If any of the off-site road improvements listed above as a construction obligation of the Owner are constructed or funded by others, then the Owner shall pay its fair share of the construction costs for each constructed road into an escrow account based on trips generated by the Project and the fair share calculation methodology identified in the current TIA Guidelines, as then determined by the County.

D. RIGHT-OF-WAY ACQUISITION

1. In the event that some of the public infrastructure improvements, at the collector road or higher facility level, required by this LOU to be made by Owner will require the acquisition of public right-of-way from third-party property owners, Owner shall exercise commercially reasonable efforts to secure such right-of-way without the assistance of the County.

2. In the event that Owner has demonstrated to the County that it is unable to secure any such public right-of-way despite its commercially reasonable efforts to do so in a timely manner consistent with the construction of public infrastructure improvements, Owner may request the County to assist in the acquisition of the needed right-of-way at Owner's sole cost and expense. If the County approves Owner's request, then the County shall have two years to acquire the needed right-of-way.

3. Should the County decide not to acquire the right-of-way, or the two years has elapsed, then Owner may be permitted to make a contribution to the County, equal to the entire anticipated project development costs, which shall include but not be limited to costs for: design, engineering, right-of-way acquisition, management, inspection, etc. in lieu of constructing the public infrastructure improvements.

3. SCHOOLS

Ballenger Run PUD – All Age is projected to generate 127 elementary school students, 70 middle school students, and 79 high school students at the time of full build-out. Based on these numbers and considering enrollment projections from pipeline development, Ballenger Run PUD – All Age will not pass the school adequacy test at the elementary or high school levels. Accordingly, Owner has elected the option to mitigate the inadequacy of the public school capacity by paying the School Construction Fee for the elementary and high school levels in accordance with the criteria set forth in Section 1-20-62 of the APFO (and in accordance with the DRRA).

Owner shall pay the School Construction Fee per unit type for the elementary and high school levels, based upon the fee schedule in effect at the time of subdivision plat recordation and payment, as set forth in Section 1-20-62(E) of the APFO. The School Construction Fee was established by Ordinance 11-18-584, enacted on July 20, 2011 and codified as Section 1-20-62 of the APFO, with a sunset provision of five years from the effective date. Notwithstanding a sunset of the School Construction Fee Ordinance, Owner shall be bound to pay the School Construction Fee as a condition of APFO approval for Ballenger Run PUD – All Age, and this obligation shall survive the sunset of the School Construction Fee Ordinance and shall run with the full term of this LOU and any duly approved extensions thereof. Owner acknowledges that School Construction Fees shall be in addition to and not in lieu of Public School Impact Fees under Chapter 1-22 of the Frederick County Code. The School Construction Fee shall be paid at the time of record plat for subdivision lots and at the time of building permits for multi-family units in accordance with Section 1-20-62(F); provided, however that no School Construction Fee shall be due for the two hundred (200) units for which Owner has the option to construct either a 200-unit CCRC or 200 age-restricted multifamily dwelling units.

4. DISCLAIMER: This LOU pertains to APFO approval only, and shall not be construed to provide any express or implied rights to continue the development process. Ballenger Run PUD – All Age remains subject to all applicable rules and regulations, including but not limited to those related to zoning, water and sewer, and subdivision. The BOCC's and the Commission's jurisdiction and authority is limited by State and County law, and approvals may be required from other local or state governmental agencies before the proposed development can proceed.

5. NO THIRD PARTY BENEFICIARY STATUS: It is expressly stated that the representations and commitments made herein by the Owner are solely for the benefit of the Owner and Ballenger Run – All Age and may not be construed to confer any rights upon any third party in regards to the future construction of any of the facilities set forth above or to the granting or reservations of any easements, rights-of-way, or other matters referenced herein. The rights and obligations of Owner under this LOU shall be binding on and inure to the benefit of Owner's successors and assigns. The purpose of this LOU is solely to set forth the APFO requirements which Owner agrees to complete as a condition of development of the Ballenger Run PUD – All Age, and no third party shall be entitled to reliance hereon for the benefit of any other project.

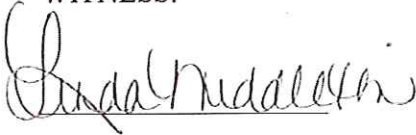
6. VESTING: Upon full mitigation (construction of improvements or fair share contributions to escrow accounts) of APFO road improvements, as set forth in Section 2 above, within the APFO approval period, the APFO road approval for the Ballenger Run PUD – All Age shall be vested for the capacity created by the improvements and shall not be subject to further APFO roadway testing unless there is an increase in site trips or a significant redistribution of site traffic because of a future change in land use or increase in site density.

Upon completion of construction of the APFO public water and sewer improvements set forth in subsections 1 (A) and (B) above, the APFO water and sewer approvals for Ballenger Run – All Age shall be vested for the capacity to be created by the improvements and shall not be subject to further APFO testing unless the density or intensity of Ballenger Run – All Age increases.

7. **PERIOD OF VALIDITY:** The effective date of this LOU for the commencement of all APFO approvals referenced herein shall be October 17, 2013, and it shall remain valid through February 21, 2023.

IN WITNESS WHEREOF, the parties have hereunto set their hands on the date first above written.

WITNESS:

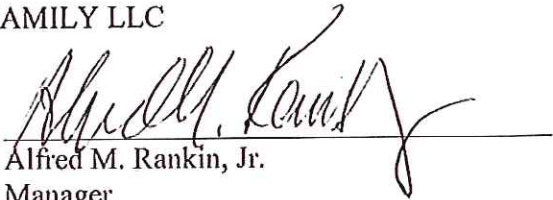


RBG FAMILY LLC

By:


Name: Alfred M. Rankin, Jr.

Title: Manager



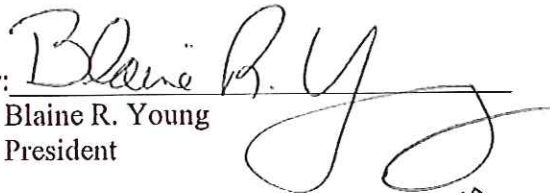
ATTEST:

BOARD OF COUNTY COMMISSIONERS
OF FREDERICK COUNTY, MARYLAND


Lori L. Depies
County Manager

By:

Blaine R. Young
President



Bm
10/17/13

**FIRST AMENDMENT TO
ADEQUATE PUBLIC FACILITIES LETTER OF UNDERSTANDING**

Ballenger Run PUD – All Age

This First Amendment to Adequate Public Facilities Letter of Understanding, Ballenger Run PUD – All Age (the “First Amendment”) is made this ___ day of _____, 2017, by and between the Frederick County Planning Commission (the “Commission”) and SeD Maryland Development, LLC, a Delaware limited liability company (“SeD”), successor in interest to RBG Family LLC.

Explanatory Note: RBG Family LLC executed that certain Adequate Public Facilities Letter of Understanding dated October 17, 2013 for Ballenger Run PUD – All Age (the “LOU”) with the Frederick County Board of County Commissioners (the “BOCC”), its successors or assigns, for the property described as the “Property” in the LOU. RBG Family LLC subsequently conveyed the Property subject to the LOU, known as Ballenger Run PUD, to SeD, and SeD is now considered the Owner of the Property under the LOU. This First Amendment is made for the purpose of amending Section 2.A. of the LOU in order to reflect certain changes to the required road improvements under the LOU because of more detailed information gained and to clarify language regarding SeD’s guarantee and completion of these road improvements as more particularly provided in this First Amendment.

The LOU is hereby amended, as follows:

1. The Explanatory Note set forth above is incorporated into the LOU as if fully restated herein.
2. Section 2.A.1.c and d on page 4 of the LOU are hereby deleted and replaced with the following:

“c. Phase III: widen Ballenger Creek Pike from the bridge north of Hannover Drive to the northern leg of the intersection of Crestwood Boulevard and Ballenger Creek Pike.

d. Phase IV: widen Ballenger Creek Pike from Corporate Drive to the bridge north of Hannover Drive.”

3. Following Section 2.A.1.d., the paragraph that begins at the bottom of page 4 of the LOU and concludes at the top of page 5 of the LOU is hereby deleted and replaced with the following:

“Phase I improvements shall be guaranteed prior to recordation of the first subdivision plat in Ballenger Run PUD – All Age, with completion prior to issuance of the 100th building permit in Ballenger Run PUD – All Age; Phase II improvements shall be guaranteed prior to recordation of the subdivision plat that

includes the 100th lot in Ballenger Run PUD – All Age, with completion prior to issuance of the 200th building permit in Ballenger Run PUD – All Age; Phase III improvements shall be guaranteed on or before February 1, 2018, with completion prior to issuance of the 400th building permit in Ballenger Run PUD – All Age; and Phase IV improvements shall be guaranteed prior to recordation of the subdivision plat that includes the 400th lot in Ballenger Run PUD – All Age, with completion prior to issuance of the 600th building permit in Ballenger Run PUD – All Age.³”

4. Add a paragraph under Section 2.C on page 7 of the LOU – new third paragraph:

SeD shall be entitled to reimbursement of the entire current escrow account balance, once a guarantee has been established for Phase III improvements, and future balances may be requested on an annual basis (up to the fair share amount as described in the next paragraph), from the following Road Escrow Accounts:

- a. #3312: BCP/Crestwood – Westbound Free Right Movement
- b. #3344: BCP/Crestwood – Second Southbound Receiving Lane
- c. #3347: BCP/Crestwood – Northbound Acceleration Lane
- d. #3762: BCP/Corporate - Signal
- e. #3763: BCP/Crestwood – Second Southbound Left Turn Lane
- f. #4412: BCP from Ballenger Creek to Crestwood – Four Lane Widening

5. Add a new subsection 4 after 2.D.3 on page 8 of the LOU:

4. Notwithstanding the above procedures, in the case of the property acquisition from the property in the northeast quadrant of the intersection of BCP and Crestwood Blvd., the County shall be responsible solely for acquiring the land necessary, in that quadrant, to permit SeD to implement improvements north of Crestwood Blvd. Notwithstanding anything in the LOU or this First Amendment to the contrary, any delay beyond that date occurring four (4) months from the date of subdivision plat submission in the completion by SeD of the Phase III improvements caused solely by the County’s acquisition of (or any delay in the acquisition of) the land contemplated by this subsection 4 for the purposes of SeD implementing these improvements north of

³ For the purposes of this section and determining phasing of improvements only, four (4) CCRC units/beds shall be deemed to equal one (1) equivalent dwelling unit; i.e., a building permit for a 200-unit CCRC building shall equal 50 equivalent dwelling units. All other dwelling types other than CCRC units shall equal one unit per equivalent dwelling unit. The Owner shall have the ability to record a subdivision plat containing a lot for the aforementioned 6.0 acre section of the Property (Land Bay D) without it counting toward these equivalent dwelling units until such time as a site plan is approved by the Commission for either a CCRC or an alternative, at which time the units included and approved on such site plan shall count toward the equivalent dwelling units for the purposes of determining phasing of improvements under this paragraph.

Crestwood Blvd. shall not hinder or delay the issuance of building permits in the Ballenger Run PUD – All Age beyond the 400th building permit as contemplated by Paragraph 3 of this First Amendment.

6. Except as herein modified, the remainder of the LOU shall remain unchanged and in full force and effect.

[SIGNATURES ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have hereunto set their hands on the date first
above written.

WITNESS:



SeD MARYLAND DEVELOPMENT, LLC

By: SeD Development Management, LLC, Manager

By:

Name: CHARLES MCKENZIE

Title: CDO

FREDERICK COUNTY PLANNING COMMISSION:

By: _____ Date: _____
William Hopwood, Chair or Robert White, Secretary

ATTEST:

By: _____ Date: _____
Gary Hessong, Director, Permits & Inspections

Planner's Initials / Date _____
(Approved for technical content)

County Attorney's Office Initials / Date _____
(Approved as to legal form)